satisfied that the accused did make a cautioned statement to SP5.

The accused in his defence also denied giving information to ASP Shahriman (SP2) in the words: "saya ada tanam ganja di tiga tempat. Saya boleh tunjuk." (I buried cannabis in 3 places and I can show). Instead he alleges that he told the police raiding party "Nazri simpan ganja" ("Nazri kept the ganja"). His explanation was that he only knew it was Nazri who kept the cannabis and not him. Looking at the prosecution evidence there was evidence by SP2 and SP3, members of the police raiding party, who testified that they heard the accused say that he had kept the drug in three places. The Court had no reason to reject the evidence of SP2 and SP3. What was more important was that not only the accused gave the information regarding the three spots where he had buried the drugs, he subsequently led the police party to recover those drugs from the three spots. Though the issue of the information was challenged vigourously by the defence, as explained earlier I ruled that the information was admissible by virtue of s. 27 of the Evidence Act 1952.

Under s. 37(da)(vi) of the Act a person in possession of more than 200 grams of cannabis is presumed to be a trafficker. In this case the weight of the cannabis recovered was 3,013 grams. From the evidence before the Court I was satisfied that the accused was in possession of the drugs and since the amount of the drugs was more than 200 grams this presumption applies. After hearing the case for the defence I came to the conclusion that the accused had failed to rebut the said presumption.

After considering the totality of the evidence before the Court I was satisfied that the defence had failed to raise a reasonable doubt in the prosecution case. In my view the prosecution had proved its case beyond reasonable doubt.

I found the accused guilty of the charge, convicted him and sentenced him to death.

SHAMUGAM S/O S. KANAPATHY

v.

PAPPAH D/O CHINNIAH NADAR

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CIVIL SUIT NO. 365 OF 1983]
5 JULY 1993

LAW OF SUCCESSION: Deceased died intestate - Rival claims to succession - Legitimacy - Whether plaintiff legitimate son of deceased - Burden of proof - Whether proof of paternity sufficient to establish legitimacy and parentage - Defendant's marriage to deceased solemnised during subsistence of earlier marriage to another person - Whether defendant lawful widow of deceased - Whether defendant's first marriage null & void for non-consumation.

PRACTICE AND PROCEDURE: Non-compliance with procedural requirement relating to form of commencement of proceedings - Whether proceedings nullified - Whether failure an irregularity - Objection - Objection raised after conclusion of hearing of case on merit - Whether objection too late - Whether failure to comply waived - Rules of the High Court O. 2 r. 1(1).

EVIDENCE: Exceptions to non-admissibility of hearsay evidence - Evidence Act 1950 s. 32(e) - Invocation of section - Prerequisite conditions - Impeachment - Statement in Joint Petition for dissolution of marriage contradicted testimony in Court - Whether credit impeached - Whether Estoppel and Res Judicata applied.

In this case both the plaintiff and the defendant claimed to be the sole and rightful beneficiary to the estate of one Kanapathy s/o Sinnathamby, deceased, who died intestate. The plaintiff commenced action by way of writ under the Distribution Act 1960 and claimed that he was the sole legitimate son of the deceased, having been born in India out of a lawful wedlock between the deceased and one Amirtham Ammal. In essence the plaintiff's claim to parentage was grounded on the following documents:

1. Certified copy of a statutory declaration sworn by the deceased during his lifetime in which the deceased swore that he was the father of the plaintiff.
2. An Emergency Certificate of Entry issued by the Madras Regional Passport Officer prior to the plaintiff's emigration to Malaysia which contained a statement by

Amirtham Ammal stating that the plaintiff was her son.

The defendant's case was that she and her three children were the only next-of-kins of the deceased, she being the lawful widow of the deceased after having married him in 1967 according to Hindu customary rites. The facts however showed that in 1966, the defendant had contracted a civil marriage to one Raman s/o Tanakody (Raman) and that this marriage subsisted and continued till 1983 when it was dissolved by the High Court, Ipoh, upon the Joint Petition of the parties. Apparently therefore the defendant,s customary marriage to the deceased was solemnised in contravention of s. 4(2) of the Civil Marriage Ordinance 1952 and was for that reason void. The defendant contended nevertheless that her 1967 marriage to the deceased was valid and lawful as the earlier marriage to Raman was never consumnated and was therefore null and void. But this assertion, as the facts further showed, contradicted her statement in the Joint Petition to dissolve her marriage to Raman, wherein she and Raman had jointly said that they had cohabited at No. 9, Stall Jalan Pusing, Batu Gajah, Perak.

As a matter of preliminary objection the defendant also challenged the propriety of the procedure adopted by the plaintiff in commencing his action and contended that the plaintiff ought to have proceeded by way of petition under s. 5 of the Legitimacy Act 1961 and not by way of writ under the Distribution Act 1960 (Revised 1980).

Held:

[1] The plaintiff is not claiming that he became or has become a legitimated person within the meaning of s. 4 of the Legitimacy Act 1961 and therefore s. 5 of that Act does not apply to the present action. In any event it is too late for the defendant to object to the procedure relating to the form of commencement of proceedings as the hearing of the case on merits had already been concluded. Such failure to comply, if any, must therefore be deemed to have been waived and treated as a mere irregularity not nullifying the proceedings by virtue of O. 2 r. 1(1) of the Rules of the High Court 1980.

[2] The statutory declaration was rightly admitted in evidence for the purpose of proving that the deceased was the father of the plaintiff as the plaintiff has satisfied the statutory requirements in s. 32(e) of the Evidence Act 1950. By virtue of the same section, that portion of the Emergency Certificate of Entry which referred to the statement of Amirtham Ammal that the plaintiff was her son, on the other hand, was hearsay and therefore inadmissible in evidence. Even admitting the Certificate into evidence, it can only prove that Amirtham Ammal is the mother of the plaintiff but not that she was married to the deceased and therefore his lawful widow and relict.

[3] In order to establish his right to succeed to the estate of the deceased the plaintiff must prove not only that he is the son of the deceased but also that he is the legitimate son of the deceased and the said Amirtham Ammal. The plaintiff was in no position to testify that he was born or conceived during his mother's marriage to the deceased without infringing the hearsay rule. Therefore although the plaintiff has established that he was the son of the deceased he failed to establish that he was a legitimate son of the deceased. Having regard to the provisions of the Distribution Act 1960 (Revised 1980) the plaintiff therefore as no right to succeed to the estate of the deceased.

[4] The Decree of Dissolution of Marriage isssued by the High Court, Ipoh had the effect of barring the defendant, both by reason of *res judicata* and *estoppel*, from alleging that her marriage to Raman was null and void for non-consumnation. Furthermore, as her said assertion contradicts her statement in the Joint Petition for divorce, the defendant's credit on the point concerned is also impeached.

[5] Having regard to s. 4(2) of the Civil Marriage Ordinance 1952 which prohibits a female from contracting a second marriage during the subsistence of the first marriage, the defendant cannot be regarded as the lawful widow of the deceased and consequently if her three children are the children of the deceased they are not his legitimate children. Neither the defendant nor the children are entitled to succeed to the estate of the deceased.

[Respective claims of the plaintiff and the defendant dismissed].

Cases referred to:

Estate of Abraham Penhas (deceased), Tan Soo Eng (widow) v. Issac Penhas [1949] MLJ 223 ***(refd)***
Then Kang Chu v. Tan Kim Hoe [1926] SSLR 1 ***(dist)***
Hazura Singh v. Mohiner Singh [1937] 18 Lah 732 ***(cit)***
Prabhakar v. Sarubai [1943] Nag. 779 ***(cit)***

Legislation referred to:
Civil Marriage Act 1952, ss. 4(2), 6(a), (b), (c)
Distribution Act 1960
Evidence Act 1950, s. 32(e)
Legitimacy Act 1961, ss. 4, 5(1), (2), (3), (4), (5)
Minor Offences Ordinance, s. 38
Registration of Births and Deaths Act 1969, s. 17
Rules of the High Court 1980, O. 2 r. 1(1), O. 71, O. 72
Statutory Declarations Act 1960

For the plaintiff - R. Rajasingam; M/s. R. Rajasingam & Co.
For the defendant - V.M. Ravi; M/s. V.M. Mohan

JUDGMENT

Edgar Joseph Jr. SCJ:
In this case, the plaintiff, Shamugam s/o S. Kanapathy, in effect, claimed a declaration that he is the only legitimate child of one S. Kanapathy s/o Sinnathamby deceased ("the deceased"), who died on 1 May 1983, leaving behind no other next of kin, that as such, he is the sole beneficiary of the estate of the deceased and, so, entitled to the whole of such estate under the Distribution Act 1960. He further claimed a declaration that the defendant Pappah d/o Chinniah Nadar, and her three children, are not the lawful wife and legitimate children of the deceased respectively, and, as such, not entitled to any share in the estate of the deceased.

Other reliefs prayed for by the plaintiff were as follows:

8.(c) an order that the defendant do forthwith render an account to the plaintiff of any of the assets of the estate of the said S. Kanapathy s/o Sinnathamby, deceased that come to her hands or possession and payment over by the defendant to the plaintiff forthwith of any money unlawfully and illegally received or collected by the defendant;

(d) an interim injunction forthwith restraining the defendant and her agents or servants from in any way applying for or obtaining Letter of Administration to the estate of the plaintiff's said father S. Kanapathy s/o Sinnathamby deceased until after the trial of this action or until the further order of this Honourable Court;

(e) an interim injunction forthwith restraining the defendant and her agents or servants from in any way soliciting for payments or receiving the payments or any of them from the State Government of Perak or its agencies for the supply of toddy by the plaintiff's said father S. Kanapathy s/o Sinnathamby deceased, during his lifetime to the State Government of Perak or its agencies until after the trial of this action or until the further order of this Honourable Court;

(f) an interim injunction forthwith restraining the defendant and her agents or servants from in any way dealing with the assets of the estate of the plaintiff's said father S. Kanapathy s/o Sinnathamby deceased, until after the trial of this action or until the further order of this Honourable Court.

(g) an order that all moneys payable by the State Government of Perak and Penang and their agencies in respect of toddy supplied by the plaintiff's said father during his lifetime be paid to the plaintiff abovenamed as the sole legal next of kin and beneficiary to this estate.

On the other hand, the defendant alleges that she is the lawful widow of the deceased, who she married on 6 August 1967, and that there are three children of this marriage, namely, Santhi, Krishna Veni and Vengai Valanattan. The defendant further denies that the plaintiff is the son of the deceased because his natural father is one Ramiah Nadar, the younger brother of the deceased. Accordingly, the defendant contends that the plaintiff is not entitled to any share in the estate of the deceased and so his claim should be dismissed.

A preliminary objection had been raised by Counsel for the defendant in his written submission - though only after the conclusion of the hearing on the merits - that the procedure adopted by the plaintiff in commencing these proceedings by way of writ is wrong and that, in any event, the Court has no jurisdiction to adjudicate on the issue of legitimacy and marriage.

As regards the objection to the procedure adopted by the plaintiff, Counsel for the defendant has contended that the plaintiff should have proceeded by way of petition under s. 5 of the Legitimacy Act 1961, which provides:

5.(1) A person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may, whether domiciled in Malaysia or elsewhere apply by petition to the High Court praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, or that his parent or remoter ancestor was legitimate; and the High Court shall have jurisdiction to hear and determine the application and to make a decree declaratory of the legitimacy or illegitimacy of that person as to the Court may seem just; and that decree shall be binding to all intents and purposes on all persons whomsoever.

(2) Every petition under this section shall be accompanied by such affidavit verifying the facts alleged in the same and by such proof of the absence of fraud or collusion, as the Court may by any general rule direct.
(3) In all proceedings under this section the Court shall have full power to award and enforce payment of costs to any person cited, whether that person shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that the costs should be paid.
(4) A copy of every petition under this section, and of the affidavit accompanying the same, shall, not less than one month before the filing thereof, be delivered to the Attorney General, who shall be a respondent upon the hearing of the petition and upon every subsequent proceeding relating thereto.
(5) Where any application is made under this section to the Court, such person or persons (if any) besides the Attorney General as the Court shall think fit shall, subject to the rules made under this section, be cited to see proceedings, or otherwise summoned in such manner as the Court shall direct, and may be permittted to become parties to the proceedings, and oppose the application.

In my view, the plaintiff here is not claiming that he became or has become a legitimated person, within the meaning of s. 4 of the Legitimacy Act 1961, which provides:

4. Subject to s. 3, where the parents of an illegitimate person marry or have married one another, whether before or after the prescribed date, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Malaysia, render that person, if living, legitimate from the prescribed date or from the date of the marriage, whichever be the later.

I therefore rule that s. 5 of the Legitimacy Act is without application in the present case, and so, this branch of the defendant's preliminary objection is overruled.

In any event, it is far too late in the day for the defendant to take any objection as to procedure relating to the form of commencement of proceedings; she had entered an unconditional appearance, filed a defence, both sides had adduced evidence in support of their respective cases and final submissions in writing have been put in. In my view, therefore, the failure to comply with the requirements of any rules in beginning proceeding (if any) must be deemed to have been waived, and such failure (if any) should be treated as a mere irregularity not nullifying the proceedings. [See Rules of High Court 1980, O. 2 r. 1(1)].

Having said that, I agree that it would have been more appropriate for either the plaintiff or the defendant to have applied by way of petition for a grant of Letters of Administration to the estate of the deceased and for the opposite party to have entered a caveat, whereupon the Judge could direct that an issue be tried. (See e.g. in the *Estate of Abraham Penhas (deceased), Tan Soo Eng (widow) v. Issac Penhas* [1949] MLJ 223). In this context, I would draw attention to the detailed procedure provided for in non-contentious as well as contentious probate proceedings in O. 71 and O. 72 of the Rules of the High Court 1980.

As regards the second objection of Counsel for the defendant which challenged the jurisdiction of this Court to adjudicate on the issues of legitimacy and validity of the alleged marriage, between the defendant and the deceased, reliance was placed by Counsel on the case of *Then Kang Chu v. Tan Kim Hoe* [1926] SSLR1.

In my view, *Then Kang Chu's* case does not assit the defendant. In that case, the respondent had in March 1924 applied to a Magistrate under s. 38 of Ordinance No. 96 (Minor Offences) for an order for maintenance against the appellant, who she alleged to be her husband. The Magistrate refused to make an order on the ground that the respondent had failed to prove that she was the wife of the appellant. She therefore commenced an action in the Supreme Court claiming a declaration that she was the wife of the appellant and therefore entitled to maintenance. The Court declared that she was the secondary wife of the appellant and entitled to maintenance.

On appeal, the point was taken for the first time that the Supreme Court had no jurisdiction to entertain a suit for a declaration of the validity of a marriage.

It was held that the Supreme Court has no jurisdiction to entertain a suit for a declaration of the validity of a marriage and no jurisdiction to entertain an application under s. 38 of Ordinance No. 96 (Minor Offences) except by way of appeal or revision.

The circumstances in *Then Kang Chu's* case are therefore poles apart from those of the present

case and I do not therefore consider it to be of any assitance to me.

I must now consider the suit on its merits.

To recapitulate, each side has challenged the right of the other to succeed to the estate of the deceased; the plaintiff alleges that he is the only legitimate son and sole heir of the deceased whilst the defendant was never lawfuly married to the deceased, so that he alone is entitled to succeed to the estate of the deceased. On the other hand, the defendant alleges that she is the lawful widow and relict of the deceased having been lawfully married to the deceased according to Hindu rites and that her three children are the children of that marriage, so that only she and her three children are entitled to succeed to the estate of the deceased.

The plaintiff has the burden of establishing his parentage; that is to say that he is the legitimate son of the deceased and one Madam Amirtham Ammal. But the burden of proof is on the defendant to establish that she is indeed the lawful widow and relict of the deceased and that her three children are the children of her marriage to the deceased.

I shall take firstly the case for the plaintiff.

The plaintiff testified on his own behalf. He called no witnesses.

He began by saying that he was 42 years of age, having been born on 4 April 1949 in the village of Vanakaruppu in the Ramanad District of India. He said his parents were the deceased and Amirtham Ammal. He further said that his father the deceased had emigrated to Malaya when he was a little child leaving him and his mother in India to stay in the house of his paternal uncle Ramasamy.

He added that whilst in Malaya the deceased used to remit money to his paternal uncle for his maintenance.

The plaintiff went on to say that in 1958, his uncle found him uncontrollable and therefore wrote two letters to his father in Tamil (P3 and P4) stressing this fact. These letters also suggest that the deceased used to remit money for the support of the plaintiff. As a result, the plaintiff was brought to Malaya by his mother and they both lived with the deceased in Dublin Estate, Kedah. The plaintiff was then 10 years of age and that was when he first recalled seeing the deceased.

The plaintiff also produced an Emergency Certificate of Entry dated 29 October 1959, issued by the Regional Passport Officer, Madras, and also an Entry Permit, dated 6 January 1960, issued by the Malaysian Immigration Department, being P6 and P7 respectively.

Counsel for the defendant did not object to the admissibility of P6 and P7 though he did object to the admissibility of p. 1 of P6 which contained a summary as follows:

> That Amirtham Ammal has stated to me that her son is a citizen of India and that I have no reason to doubt her statement.
>
> **Father's name** - Ganapathy.
>
> **Place and date of birth** - Vanakaruppu Ramanathaipuram District, 1949.
>
> **Address in India** - Vanakaruppu Village Penyukottai P.O. Ramanathapurnam District.
>
> **Colour of eyes and hair** - scar on left eye brow.

Though I had over-ruled the objection, reflection reveals that there is substance in the objection. The contents of p. 1 of P6, except for the reference to the scar on the left eye brow, must undoubtedly have been derived from statements made by Amirtham Amal who was not called to testify and as such are plainly hearsay and inadmissible. I agree, however, that the rest of Ex. P6 is admissible.

It follows that Ex. P6 does not by itself establish the paternity of the plaintiff and, certainly, it does not by itself establish that the deceased was the father of the plaintiff. I am satisfied, however, that P6 does relate to the plaintiff and that he is the person referred to as Shinmugam therein and, together with the Entry Permit issued by the Malaysian Immigration Department (Ex. P7), tend to confirm the plaintiff's testimony that he did leave India for Penang, arriving there on 6 January 1960. The plaintiff also indicated in Open Court the scar he bears on his left eye brow.

Counsel for the defendant had objected to the admissibility of the two letters P3 and P4, on the ground that it was hearsay, the uncle not having been called to testify. Counsel for the plaintiff replied that he would comply with s. 32 of the Evidence Act. I over-ruled the objection subject to compliance with s. 32 of the Evidence Act.

At the end of the day, however, no attempt had been made to comply with the strict

requirements of s. 32; not even the pre-requisites of that section, let alone any of the exceptions laid down therein. In my view, therefore, these letters are inadmissible in evidence being hearsay, and I rule that they are worthless as evidence.

To continue the plaintiff's narrative of events, he testified that on 9 March 1964, the deceased swore a statutory declaration to obtain an identity card for him and that, in consequence, he was duly issued a red NRIC 7913404. The plaintiff then produced a certified copy of that statutory declaration and there being no objection by Counsel for the defendant it was duly admitted and marked as an exhibit. (See P8). The plaintiff did **not** however produce his NRIC in Court for inspection nor did he produce a certified copy thereof. But, more importantly, he did **not** produce his birth certificate.

On the other hand, the defendant produced a birth certificate issued by the Department of Revenue Government of Tamil Nadu, which purported to be the birth certificate of the plaintiff issued pursuant to s. 17 of the Registration of Births and Deaths Act 1969, wherein it appears that one Shanmugam was born on 22 July 1952, in Periakottai, whose father and mother are named as Ramiah Nadar and Sowdaram, respectively. (See Ex. D11).

An endorsement on D11 states: "Birth of the male child registered upon the orders of the Chief Judicial Magistrate, Sinagangu, in Misc. Petition No. 211/87 dated 5 February 1987.

In my opinion, there is insufficient evidence to establish that the person referred to as Shamugam in D11 is the plaintiff, and I therefore disregard, D11.

Turning to the statutory declaration which purports to have been made by the deceased, it reads as follows:

Statutory Declaration

I, Kanapathy s/o Sinnathamby the holder of National Registration Identity Card No. 3932354 of Maryland Div: Dublin Estate, Karangan, Kedah do solemnly and sincerely declare that, my son Shanmugam s/o Kanapathy was born at Vanarauppu Village, Ramanathapuram District, South India on 4 April 1949. I am filling this solemn declaration to enable me to obtain an Identity Card for my son above named.

And I make this solemn declaration conscientously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act 1960.

Subscribed and solemnly declared by the above named Kanapathy s/o Sinnathamby of Maryland Div: Dublin Estate, Karangan Kedah at the Magistrate's Court at Kulim in the State of Kedah this 19 March 1964.) Sgd. (illegible)

Before me.
Sgd.
Magistrate
Kulim Kedah

It was argued by Counsel for the defendant that the contents of this statutory declaration were hearsay and therefore inadmissible.

The 5th exception to the hearsay rule provided for under s. 32(e) of the Evidence Act is as follows:

> 32. Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:
>
> (e) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

but subject to proof of the identity of the maker of the statement. (See *Hazura Singh v. Mohinder Singh* [1937] 18 Lah. 732).

It follows that the **four** conditions must be satisfied before the exception contained in s. 32(e) can be successfully invoked; they are:

Firstly, the statement written or verbal, of relevant facts must have been made by a person who is dead or cannot be found etc. as required under the pre-requisite requirements of s. 32; secondly, the statement must relate to the existence of any relationship by blood, marriage or

adoption; thirdly, the person making the statement must have special means of knowledge as to the relationship in question, and lastly the statements must have been made before the question in dispute arose.

In the case of members of the family, a special knowledge is to be presumed. (See *Prabhakar v. Sarubai* [1943] Nag. 779).

I am satisfied that the plaintiff has satisfied all the requirements of s. 32(e), and that Ex. P8 was rightly admitted in evidence, for the purpose of proving paternity, that is to say, for the purpose of proving that the deceased was the father of the plaintiff.

The question, what weight should be given to Ex. P8 is a separate question from its admissibility.

The defendant has attempted to pour scorn on P8 by alleging that the plaintiff is the son of Ramiah Nadar the younger brother of the deceased. In this she was supported by her cousin Karrupiah s/o Pollaiyan (DW1). I do not propose to wade through their testimony on this point.

Suffice it to say that neither the defendant nor Karrupiah could possibly have personal knowledge of facts relevant to this allegation. The allegation as to the paternity of the plaintiff is based on pure surmise, is hearsay and therefore worthless as evidence.

However, in order to establish his right to succeed to the estate of the deceased who died intestate, the plaintiff must by reason of the Distribution Act 1960, go further and prove not only that he is the son of the deceased but also that he is the **legitimate** son of the deceased. Does the statutory declaration of the deceased prove this point?

In my opinion, even accepting P8 at its full face value, it does not. Nor, for that matter, does the Emergency Certificate, P6, assist the plaintiff on this point. It is true that P6 by para 1 does state "This is to certify that Amirtam Ammal has stated to me that her son Shanmugam is a citizen of India and that I have no reason to doubt his statement." But does this prove the maternity of the plaintiff ? In my opinion, it does not for the contents of para 1 of P8 as to what Amirtham Ammal allegedly said to the Regional Passport Officer, namely, that Shanmugam is her son, is hearsay.

None of the pre-requisites of s. 32 of the Evidence Act have been satisfied; that is to say, no attempt had been made to prove that Amirtham Ammal is dead or cannot be found etc. Moreover, even if such proof had been adduced, so that exception (e) to s. 32 could be invoked by the plaintiff, P6 would merely afford proof that Amirtham Ammal is his mother but not that she was married to the deceased and therefore his lawful widow and relict.

I need hardly add that the plaintiff himself was in no position to testify that he was born or conceived during his mother's marriage to the deceased without infringing the hearsay rule.

It follows, therefore, that although the plaintiff has estabiished that he is the son of the deceased, he has failed to establish that he is the legitimate son of the deceased and so he has no right to succeed to the estate of the deceased having regard to the provisions of the Distribution Act 1960, (Revised - 1983), and I so declare

I next turn to consider the case for the defendant.

The defendant testified that in September 1966 she had been brought to Malaysia from India by a relative named Tanakody and that to enable her to reside permanently here she had married one Raman s/o Tanakody.

It is common ground that that marriage was solemnised on 16 November 1966 at the Registry of Civil Marriages, Kinta, in the State of Perak, pursuant to the Civil Marriage Act 1952, but was dissolved by the High Court, Ipoh, on 19 April 1983, following the grant of a *decree nisi* for dissolution on 20 June 1983 (Ex. D12) by "mutual consent" upon the Joint Petition (Ex. P18) of the parties thereto.

The defendant nevertheless claims that she had married the deceased on 6 September 1967 at Dublin, Kulim, in the State of Kedah, according to Hindu customary rites. In support, the defendant called a witness Raman Chitnari (DW2) who claimed that he was employed by the deceased as a driver and that he was present at the ceremony of marriage which was conducted by a Hindu priest. He added that he saw the deceased tie a "tali" round the neck of the defendant. This may or may not be true but the difficulty with which the defendant is faced is that s. 4(2) of the Civil Marriage Ordinance

1952, which was in force at the material time, provides:

> 4.(2) A female person married in accordance with the provisions of this Ordinance, shall be incapable, during the continuance of such marriage, of contracting a valid marriage with any third person either as his principal or as his secondary wife.

Furthermore, s. 6 of the Civil Marriage Ordinance provides:

> 6. Every marriage duly solemnised under this Ordinance shall continue until dissolved in any of the following manner:
>
> (a) by the death of one of the parties or
> (b) by order of a Court of competent jurisdiction or
> (c) by a declaration made by a Court of competent jurisdiction that the marriage is null and void.

The defendant's answer to this objection is that her marriage to Raman s/o Tanakody was one of convenience only to enable her to obtain permanent residence in this country and that it was never consummated with the result that it was null and void. In this, the defendant's testimony was corroborated by the testimony of Raman s/o Tanakody (DW3) himself.

But, the version of the defendant and Raman s/o Tanakody that the marriage was a sham and null and void for non-consummation is flatly contradicted by the contents of their own Joint Petition for Divorce dated 9 June 1983 (P18) verified by affidavit and, in particular, para 3 thereof which reads:

> The petitioners have **cohabited** at No. 9, Stall Jalan Pusing, Batu Gajah, Perak.

The effect of the contradiction aforesaid, is, to my mind, virtually conclusive, if not conclusive, against their credibility. In other words, their credit, on the point concerned, is impeached.

In any event, the effect in law of the decree of dissolution of marriage - **not**, be it noted, a decree of nullity - pronounced by the High Court, Ipoh, which was a Court of competent jurisdiction, is to bar the defendant and Raman s/o Tanakody from alleging both by reason of *res judicata* and *estoppel* that their marriage was null and void for non-consummation.

I must therefore further declare that the defendant is not the lawful widow and relict of the deceased and that, consequently, even if her three children are the children of the deceased they are not his legitimate children so that neither the defendant nor any of her children are entitled to succeed to the estate of the deceased who died instate.

As both parties have failed in their attempt to establish their claims as to entitlement to succeed to the estate of the deceased, I would make no order as to costs.